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THE STATE OF NEW HAMPSHIRE



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February 25, 1988

Delbert F. Downing, Chairman  
Wetlands Board  
64 North Main Street  
Concord, New Hampshire 03301

Dear Mr. Downing:

By memorandum dated January 29, 1988, you requested our advice regarding the proper manner in which permit applications pending before the Wetlands Board and requiring approval by the Governor and Executive Council should be handled. We understand that this inquiry relates to recent action by the Wetlands Board and the Governor and Executive Council regarding the dock application of Brewster Academy in Wolfeboro, New Hampshire.<sup>1</sup> Specifically, you have asked on behalf of the Board the following questions:

1. Can the Board attach Governor & Executive Council conditions to a permit as additional and separate conditions?

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<sup>1</sup> We understand that the Brewster Academy proposal for a dug-in boat basin for 14 slips, a breakwater and a boathouse was approved by the Wetlands Board on October 13, 1987. The Governor and Executive Council approved this project pursuant to RSA 483-A:1,II(a) on December 2, 1987, subject to four conditions. These conditions are set forth in the minutes of the Governor and Executive Council December 2d meeting. See copy attached.



2. Can the Board modify a permit to meet Governor & Executive Council requirements after Governor & Executive Council action, or does the modified permit have to be resubmitted to Governor & Executive Council?
3. What happens if a Governor & Executive Council condition exceeds the Board's authority? Does 483-A:1 imply authority relative to such a condition?

As you are aware, Chapter 148, Laws of 1987 [effective July 10, 1987], amended RSA 483-A:1 and established the permit review and approval process to which your questions relate. RSA 483-A:1,II(a) now requires the Wetlands Board to

[s]ubmit to the governor and council all requests for permits approved by the board which meet the definition of major projects located in great ponds or public owned water bodies under the rules of the wetlands board which have been approved by the board as complying with the requirements of the rules.

The next paragraph requires the Governor and Executive Council to consider a request for permit transmitted by the Board and states that

[t]he council may approve as transmitted or deny the submitted request. Following action by the Governor and Council the request shall be returned to the board for permitting, if approved, or filing, if denied.

RSA 483-A:1,II(b) [emphasis added].

The language of this provision is precise. "When language used in a statute is plain and unambiguous, its meaning may not be modified by construction...[and] we need not look beyond the statute itself for further indications of legislative intent." Bradley Real Estate Trust v. Taylor, 128 N.H. 441, 444 (1986) [citations omitted]; see State Employees' Ass'n. of New Hampshire, Inc. v. State, 127 N.H. 565, 568 (1986). Fairly read, this clause limits the action of the Governor and Executive Council to either approving the terms and conditions of the permit request which has been referred by the Board, or denying that which has been referred. By including the phrase "approve as transmitted" (emphasis added) the legislature has explicitly limited the Governor and Executive Council's discretion to approve a permit request subject only to specified conditions which the Wetlands Board imposed upon its own approval. In short, the Governor and Executive Council may not approve a request for permit and at the same time write into the permit additional conditions.

Conversely, where a permit request is denied by the Governor and Executive Council, RSA 483-A:1,II does not limit the discretion of the Governor and Executive Council to state explicit conditions which, if imposed as part of a permit request approved by the Wetlands Board or otherwise included in the underlying project proposal, would ultimately result in an approval by the Governor and Executive Council. Moreover, as to your second question, a denial by the Governor and Executive Council of a request for permit would require the applicant to modify its proposal and reinitiate the RSA 483-A:1 permit review process. The last sentence of RSA 483-A:1,II(b) states that, where approved, the request for permit is returned to the Board for final permitting and, where denied, it is returned for "filing" only. In other words, whether the final action taken by the Governor and Executive Council under RSA 483-A:1,II is approval or denial of the request for permit, the review process reaches an end, and, in the case of a denial, can only be reactivated by the submission of a new application to the Wetlands Board. Once again, this result is mandated by the precise provisions of RSA 483-A:1,II.<sup>2</sup>

In the case of Brewster Academy the Governor and Executive Council minutes indicate that they authorized the Brewster Academy plan subject to the certain conditions. Because the Governor and Executive Council's approval was not unconditional, we would construe its action, in light of the discussion above, as a denial. Unless the Governor and Executive Council were to reconsider its decision,<sup>3</sup> the Brewster Academy request for permit should be returned to the Wetlands Board for filing in accordance with RSA 483-A:1,II(b). As stated above, Brewster Academy is free to modify its proposal and submit a new application to the Wetlands Board under RSA 483-A:1,I.

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<sup>2</sup> A related question is whether the Wetlands Board can modify its recommendation to the Governor and Executive Council before the Governor and Executive Council have taken final action by approving or denying the request for permit. Nothing in RSA 483-A:1 prohibits the Wetlands Board from withdrawing and revising on its own initiative its recommendation prior to final action by the Governor and Executive Council. Moreover, because the permitting process is not final until a request for permit is returned to the Wetlands Board for either permitting or filing, RSA 483-A:1,II(b), the Wetlands Board is not necessarily confined to its initial recommendation. Rather, it is free to reconsider its original recommendation provided it does so before final action by the Governor and Executive Council.

<sup>3</sup> Because the Governor and Executive Council in their decision of December 2, 1987, either overlooked or mistakenly conceived the decision-making options available to them under RSA 483-A:1,II, they are not now precluded from reconsidering their December 2 decision upon the same record upon which that decision was based. See Lambert Construction Company, Inc. v. State, 115 N.H. 516, 519 (1975); see also Meserve v. State, 119 N.H. 149, 152 (1979).

Delbert F. Downing, Chairman  
February 25, 1988  
Page 4

Your third question (really two related questions) assumes that the Governor and Executive Council have some authority to insert additional conditions into requests for permits submitted by the Board and asks us to determine the consequences where, hypothetically speaking, a condition imposed by the Governor and Executive Council exceeds the permitting authority of the Wetlands Board. However, we are reluctant to provide explicit advice in hypothetical situations. In this instance, no information was provided in the Board's January 29 memorandum indicating that the four additional conditions sought by the Governor and Executive Council relative to the Brewster Academy request for permit exceeded the Board's authority under RSA Ch. 483-A. Moreover, such a determination seems unnecessary given our conclusion that the Governor and Executive Council cannot modify a request for permit by inserting their own conditions. Lastly, to the extent that your third question raises any issue regarding the extent and scope of the authority of the Governor and Executive Council to approve or deny requests for permits under RSA 483-A:1, we would prefer to discuss any such issues in the first instance with the Governor and Executive Council.

I trust that this is responsive to your inquiry. The Wetlands Board should feel free to contact this office should further clarification be necessary.

Yours truly,



Robert P. Cheney, Jr.  
Senior Assistant Attorney General  
Environmental Protection Bureau

RPC/sed  
Enclosure  
#O-88-005

cc: Governor John H. Sununu  
Honorable Raymond S. Burton  
Honorable Peter J. Spaulding  
Honorable Ruth L. Griffin  
Honorable Earl A. Rinker, III  
Honorable Bernard A. Streeter, Jr.  
Alden H. Howard, Commissioner, DES

The Governor and Executive Council convened at 10:30 A.M., all members being present.

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The Governor and Council, on motion of Councilor Streeter, seconded by Councilor Spaulding, authorized acceptance of the minutes from the meeting of November 9, 1987.

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The Governor and Council, on motion of Councilor Streeter, seconded by Councilor Griffin, confirmed the appointments of the several persons nominated for Civil Service Commissions at the November 9, 1987 meeting.

The Governor placed in nomination the several persons who applied for Civil Commissions.

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The Governor and Council accepted with regret the following resignations:

CONNECTICUT RIVER ATLANTIC SALMON COMPACT

George I. Wiggins  
Sunapee

Effective: Immediately

AIR RESOURCES COUNCIL

John L. Glidden, Sr.  
Ashland  
(Manufacturing Component of Industry)

Effective: Immediately

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The Governor and Council confirmed the following appointments:

DEPT. OF EMPLOYMENT SECURITY - APPELLATE BOARD

Roger E. Gagnon  
Manchester  
(Labor) Reappointment

Term: October 14, 1990

PESTICIDES CONTROL BOARD

Jeffrey R. Huntington  
Loudon  
(N.H. Horticultural Society) Reappointment

Term: November 6, 1990

William Pellow  
Nashua  
(Public Member) Vacancy

Term: November 23, 1989

## #178 LABOR DEPT.

The Governor and Council, on motion by Councilor Burton, seconded by Councilor Rinker, authorized transfer of appropriated funds of \$12,100 for an expansion cabinet and new phone equipment for thirteen additional phone and four outside Centrex lines. (Fiscal Committee approval 11/2/87.)

## #179 DEPT. OF EMPLOYMENT SECURITY

The Governor and Council, on motion by Councilor Burton, seconded by Councilor Streeter, authorized tuition agreement with NH Tech. Institute in Concord at \$275 for Jolene Stewart.

## #180 &amp; #181 DEPT. OF ENVIRONMENTAL SERVICES

The Governor and Council acted as follows:

#180 (Water Supply & Pollution Control Division) Authorized the use of \$32,031 in Permanent Personnel Services funds to pay for overtime required because of pending recruitment.

#181 (Water Resources Division) Authorized the Brewster Academy plan to dredge an 11,000 square foot dug-in basin, to construct breakwater and to construct a boathouse in Wolfeboro on Lake Winnepesaukee subject to the following conditions:

- A. ...that the petitioner, Brewster Academy, must comply fully with all conditions and/or covenants placed on the subject project by the Town of Wolfboro;
- B. ...that the subject docks are to be used for Academy purposes solely and not for commercial or any other use;
- C. ...that the subject docks are the maximum amount of docks to be constructed on Brewster Academy property and the entire shoreline of the Academy is dedicated to said docks;
- D. ...that the title to or use thereof of the docks will not be transferred in any way by way of deed, lease, or rental agreement.

## #182 - #184 ELDERLY &amp; ADULT SERVICES

The Governor and Council acted as follows:

#182 Authorized the reclassification of Social Worker Consultant, LG 19 to Supervisor IV, LG 24 (Fiscal Committee approval 11/2/87).

#183 Authorized tuition agreement with NH College at \$522 for Norman Gill, Program Specialist IV.

#184 Authorized agreement with Crotched Mountain Community Care, Inc. at \$39,000 to provide funds for stipends, travel and support services for 65 Foster Grandparents in Hillsborough, Sullivan and Cheshire counties; allows elderly citizens to share their knowledge and life experiences with exceptional and/or special needs children.